

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 97-88

December 24, 1997

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Acting Associate General Counsel

SUBJECT: Electronic Freedom of Information Act Amendments of 1996

The Electronic Freedom of Information Act Amendments of 1996, most provisions of which were effective either March 31 or October 2, 1997, address for the first time the applicability of FOIA to electronic records. (See attachment.) The amendments also include changes regarding time limits for responding to FOIA requests and other procedural provisions.

Pursuant to 5 U.S.C. 552(f)(2), the term "record", as used in FOIA, includes information contained in an electronic format. Accordingly, electronic records, including e-mails, are now explicitly covered by FOIA.

The amendments also state that the Agency shall provide a "record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. 552(a)(3)(B). Moreover, the Agency is required to make reasonable efforts to maintain its records in forms or formats that are reproducible. In responding to requests for records, the Agency is required to make reasonable efforts to search for the records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. 552(a)(3)(C).

If there is a partial disclosure of a record, the amount of information deleted must be indicated on the released document unless doing so would harm an interest protected by the relied upon exemption. If technically feasible, the amount of information deleted shall be indicated at the place in the record where such deletion was made. 5 U.S.C. 552(b). When denying a request in whole or in part, the Agency must provide the requester with a reasonable estimate of the volume of the withheld

record(s) unless doing so would harm an interest protected by the relied upon exemption. 5 U.S.C. 552(a)(6)(F).

Agency responses to FOIA requests are now due no more than 20, rather than no more than 10, working days from receipt of the request. 5 U.S.C. 552 (a)(6)(A)(i). As before, the statute requires that the Agency “shall make the records promptly available,” so that the increase from 10 to 20 days is not a license to take the full 20 days in situations where the responsive records are easily obtainable and can be provided earlier. 5 U.S.C. 552 (a)(3)(A). The Agency may take either an additional 10 days, or the number of days agreed to in writing with the requester, when there are “unusual circumstances”, which are defined as the need to search for and collect the records from offices other than the office processing the request; the need to search, collect and examine voluminous documents; or the need for consultation among the Agency’s offices or with another agency having a substantial interest in the determination of the request. 5 U.S.C. 552(a)(6)(B).

The Agency continues to be required to make available for public inspection and copying final opinions and orders of the Agency, policy statements and manuals. In addition, the Agency is now required to make available for inspection and copying those records, disclosed in response to a FOIA request, which the Agency “determines have become or are likely to become the subject of subsequent requests for substantially the same records.” 5 U.S.C. 552(a)(2)(D). Our FOIA Officer in Headquarters will be responsible for compiling and maintaining these records. If Regions have records which they believe are encompassed by this subsection, they should contact the Agency’s FOIA Officer.

Beginning October 1, 1997, the Agency’s annual report will be based on FOIA activity during the fiscal year rather than, as in the past, the calendar year. Thus, due to the transition from calendar to fiscal year reporting, the annual report for 1997 will cover the period January 1 through September 30, 1997. The information to be provided for this report will be the same as it has been in prior years. Starting with Fiscal Year 1998, additional data must be included in the report and, accordingly must be maintained by the Regions as of October 1, 1997:

1. A list of all Exemption 3 statutes relied upon to withhold information.¹

¹ Exemption 3 of FOIA provides for withholding documents as required by any statute other than FOIA.

2. The number of FOIA requests received.²
3. The number of FOIA requests pending as of September 30 of the preceding year and the median number of days that such requests have been pending as of that date.
4. The median number of days taken by the Agency to process the requests.³

If there are any questions, please contact Assistant General Counsel John Hornbeck or your AGC or Deputy.

R.A.S.

cc: NLRBU

Attachment

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² Regions must continue to maintain information as to the number of requests “processed” (i.e., responded to) under FOIA.

³ The FOIA amendments refer to the median number of days taken by the Agency to process “different types of requests.” In this regard, the Agency, by promulgation of regulations, may provide for “multitrack” processing of requests and must provide for expedited processing of requests. Until the Agency promulgates these regulations, the Regions should simply keep track of the median number of days to process all requests.